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No. 88-198

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SEQUOIA BOOKS, INC.,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the search warrant comply with constitutional authority? Were the officers limited to seizing only magazines that portrayed specifically described sexual acts? Was there a prior restraint? Is there any conflict between the Illinois Appellate Court opinion and decisions from the Courts of Appeals?

2. Did the procedure which provided special interrogatories to assure that single general verdict was based upon specific consideration of all the magazines comply with constitutional authority? Did this procedure affect the independent function of the jury? Did it actually benefit petitioner?

3. Is the Illinois statute invalid for providing no definition of the term "prurient"?

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PRAYER

The State of Illinois asks this Court to deny the Petition for Writ of Certiorari to review the judgment and order of the Appellate Court of Illinois, Second District, insofar as the defendant does not raise any issues worthy of review.

OPINION BELOW

The opinion below, dated March 9, 1988, in cause No. 2-87-0053, is uncited pursuant to Illinois Supreme Court Rule 23. A copy is reprinted in petitioner's appendix.

STATEMENT OF THE CASE

Defendant Sequoia Books, Inc. owns and operates the Denmark Bookstore in Aurora, Illinois. It was charged by complaint May 13, 1986, with one count of obscenity for selling obscene material in Kendall County, Illinois, and found guilty after a jury trial. Defendant was sentenced to a fine of $1,000 and costs of $208.

The charge of obscenity arose after a Kendall County judge issued a search warrant, supported by an affidavit of a police officer and by three magazines that had been purchased at the store. The affidavit said that: the officer visited the bookstore; he purchased three magazines entitled Anal Climax No. 3, HOM Video Number 1, and Pussy Polking; each magazine depicted more than one sexual act such as cunnilingus, fellatio, analingus, anal intercourse, excretion of semen from penis onto other persons, masturbation, vaginal or anal insertion of tongue into anus, and depiction of male or female persons with genital or breasts being fettered, bound or otherwise physically restrained, insertions of objects into penis or anus; during thirty minutes in the store he observed several hundred magazines many of which, if not all, depicted these same acts and all of which were offered for sale to the public. Pursuant to the warrant which limited seizure to maga-

zines portraying specifically described sexual acts, authorities seized 166 magazines.

Defendant pled not guilty and moved to quash the search warrant and to suppress evidence on the basis of the first, fourth, and fourteenth amendments. Defendant also moved to dismiss the count on two bases: that it was improper to include a large number of magazines in a single count and that the new Illinois Obscenity Statute was without any defintion of the phrase "appeal to prurient interest." After hearings on the motions, they were denied.

At trial, the parties stipulated that defendant owned and operated the Denmark Bookstore and offered the charged magazines for sale on the date in question, knowing the nature and contents of the magazines. The State offered testimony from the police officers regarding the seizure of the magazines. The magazines were admitted into evidence and the jury reviewed several of them under a cautionary instruction. The State offered expert testimony of a licensed psychologist and social worker that the magazines lacked value and had an unwholesome effect on the average adult. It also presented testimony that the magazines had no literary or artistic value.

Defendant did not present any evidence on its own behalf.

At the jury instruction conference, the State tendered an instruction permitting the jury to find defendant guilty if it found a single magazine obscene. Defendant tendered an instruction requiring the jury to find all charged magazines obscene before finding defendant guilty. The trial court gave the State's instruction, explaining that the State could proceed on a single count for as large a number of magazines as it chose and obtain a conviction regardless of a finding by the jury that some magazines were not obscene.

Also, over defense objection, the jury was given general verdict forms, along with special interrogatories requiring the jury to answer "yes" or "no" as to the obscenity of each of the magazines. The jury found 160 magazines obscene and six not obscene.

On direct appeal, petitioner raised numerous allegations of error, including the claims he raises in his petition to this Court.

REASONS FOR DENYING THE PETITION

I.

THERE IS NO REASON WHY THIS COURT SHOULD REVIEW THE SEARCH WARRANT PROCEDURE SINCE IT COMPLIED WITH CONSTITUTIONAL AUTHORITY; PETITIONER HAS FAILED TO SHOW THAT CONSTITUTIONAL ERROR OCCURRED OR THAT THE STATE'S DECISION CONFLICTS WITH DECISIONS FROM THE COURTS OF APPEALS.

Defendant alleges two reasons why this Court should review the search warrant procedure in this case: 1) this Court must correct constitutional error that occurred within that procedure and 2) it must resolve a conflict in the law regarding search warrants in first amendment cases. However, neither is a reason for granting review.

First, constitutional error did not occur in this case. Despite defendant's claim to the contrary, the search warrant procedure was consistent with the special first amendment requirements outlined by this Court in *New York v. P.J. Video*, 475 U.S. 868 (1986). *P.J. Video* requires that, before authorizing the seizure of materials presumptively protected by the first amendment, the magistrate

must make sure that the warrant application is supported by affidavits setting forth specific facts. This requirement enables the judge to focus searchingly on the question of obscenity. Furthermore, the police may not dispense with the warrant requirement, as they ordinarily could in exigent situations, whenever this would constitute a prior restraint. If a defendant meets a burden of making a pretrial showing of a "substantial" prior restraint, then a large-scale seizure must be preceded by a hearing on the obscenity question before the search can take place.

But aside from these, warrant applications for seizures of allegedly obscene magazines are the same as those applied generally. The magistrate must apply a uniform standard of probable cause: a probability or substantial chance of criminal activity; not an actual showing.

The principles of *P.J. Video* were followed by the issuing magistrate in the cases at bar. The judge who issued the warrant searchingly focused on the obscenity of the magazines to be seized. The judge made sure that the warrant application was supported by an affidavit describing the context in which certain magazines were displayed in the Denmark Bookstore and particularly describing specific sex acts depicted in them. Several magazines purchased from the store were provided to the issuing magistrate for his review. This gave the judge the opportunity to determine that there was a probability of criminal activity occurring in the bookstore, namely the sale of magazines not protected by the first amendment. The judge therefore issued a warrant authorizing officials to seize only other such magazines.

The warrant was not a broad one which left total discretion to the executing officers. Rather, the officers were limited to seizing only the magazines that portrayed the sexual acts specifically described on the warrant.

Nor is there a system of prior restraint in place in Kendall County. According to *P.J. Video*, a prior restraint occurs only when the police rely on exigent circumstances and make a large-scale seizure without a warrant. But there is no prior restraint so long as the police first obtain a warrant. There was no prior restraint in this case since defendant never showed a "substantial" prior restraint. Indeed, there is no evidence that defendant was in any way economically harmed, that the police seized any more than a single copy of each magazine, or that the store was closed down. Rather, it appears from the record that some magazines were seized for evidentiary purposes and the store continued to operate throughout the entire prosecution.

Similar warrant procedure was upheld in *People v. Sequoia Books*, 145 Ill. App. 3d 1054, 495 N.E.2d 1292 (2nd Dist. 1986), *People v. Sequoia Books*, 146 Ill. App. 3d 1, 496 N.E.2d 740 (2nd Dist. 1986), *People v. Sequoia Books*, 150 Ill. App. 3d 211, 501 N.E.2d 856 (2nd Dist. 1986), *People v. Sequoia Books*, Nos. 2-86-563 and 2-86-577 (1987) (cert. denied October 3, 1988, No. 87-1646), and *People v. Sequoia Books*, No. 2-86-1030 (1987) (cert. denied October 3, 1988, No. 87-1975). Therefore, defendant has failed to show the existence of a constitutional error that needs correction by this Court.

Defendant also claims that the Illinois Appellate Court's refusal to condemn these warrants as general warrant cannot be squared with two cases from the Courts of Appeals, *United States v. Guarino*, 729 F.2d 864 (1st Cir. 1984) and *United States v. Tupler*, 564 F.2d 1294 (9th Cir. 1977). But, in fact, there is no conflict between these cases and the Illinois Appellate Court opinion. These opinions agree that a search warrant must define what is to be seized with specificity so that the executing officer may not exercise judgment when making seizures and that

probable cause for a warrant requires that the materials first be viewed.

In *Guarino*, specificity was lacking because the warrant authorized nothing more specific than the seizure of "obscene materials," leaving it to the officer's opinion to decide what is obscene. *Guarino*, 729 F.2d at 865, 867. But specificity was not lacking in this case. The warrant authorized the officers to seize only those magazines depicting specifically defined acts. The warrants at bar contained the specificity found lacking in *Guarino*.

In *Tupler*, probable cause was lacking because the State did not view the alleged obscene films nor tender them to the issuing judge for review, but assumed they were obscene from film packaging. *Tupler*, 564 F.2d at 1297. But probable cause was not lacking in this case. The affidavit of the investigator demonstrated that he himself spent thirty minutes in the Denmark Bookstore where he observed hundreds of magazines, noted how the magazines were displayed, and he particularly described the specific sex acts that he saw depicted in them. The issuing magistrate also had the opportunity to observe several of these same magazines. The warrants at bar were based on the probable cause that was lacking in *Tupler*.

II.

THE PROCEDURE ALLOWING A SINGLE CONVICTION AND GENERAL VERDICT BASED ON NUMEROUS MAGAZINES ASSURED SPECIFIC CONSIDERATION OF ALL THE MAGAZINES BY USE OF SPECIAL INTERROGATORIES; THE SPECIAL INTERROGATORIES DID NOT IMPAIR THE JURY'S INDEPENDENT FUNCTION AND ACTUALLY BENEFITED PETITIONER.

Defendant asks this Court to review the procedure seeking a single conviction based on numerous magazines because he says it resulted in constitutional error. He claims

that the single count method denied the jury the opportunity to specifically consider each magazine and created the probability that no twelve jurors unanimously agreed upon the obscenity of any one magazine.

However, constitutional error did not occur here. Illinois sought a single conviction for obscenity based on any of 166 individual magazines. To assure that all twelve jurors gave specific consideration to all the material, the jurors were required to answer special interrogatories as to the obscenity of each separate magazine. This procedure was earlier approved in Illinois in *People v. Sequoia Books*, Nos. 2-86-563 and 2-86-577 (1987) (cert. denied October 3, 1988, No. 87-1646), and *People v. Sequoia Books*, No. 2-86-1030 (1987) (cert. denied October 3, 1988, No. 87-1975).

This Court saw in *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 1362 (1969), that in some circumstances a general verdict can present a problem. Thus, in *Street*, the validity of a general verdict for flag desecration was questionable where there was no way to know from the record whether it was based on the permissible ground of burning the flag or the impermissible ground of speaking contemptuously about the flag or an impermissible combination of both. But that problem was eliminated at bar by the giving of special interrogatories. This procedure assured that each member of the jury specifically considered each magazine and reached unanimous agreement upon each magazine before finding any single magazine to be obscene. The jury unanimously agreed that 160 of the magazines were obscene and supported its single verdict whereas six magazines were not obscene.

The procedure created several additional advantages here, as well. It reduced the vast number of instruction and verdict forms that would have otherwise been necessary, it made it possible to return the non-obscene books to the defendant, and it lessened the collective impact of

the material because the jury did not have to find defendant guilty of 160 offenses. It exposed defendant to only one obscenity conviction, rather than 159 additional convictions.

While it is true that special interrogatories are not generally given in criminal trials, the Constitution does not forbid them. *See Heald v. Mullaney*, 505 F.2d 1241 (1st Cir. 1974). They are suspect only insofar as they may jeopardize the independence of the jury by coloring its decision-making process with a step-by-step series of questions inexorably leading it to conclude that a defendant is guilty. *Heald*, 505 F.2d at 1246; *United States v. Spock*, 416 F.2d 165, 182 (1st Dist. 1969). Where they do not impair the jury's independent function and actually benefit a defendant, their use will survive a constitutional challenge. *Heald*, 505 F.2d at 1246.

Here, the special interrogatories imposed no special burden on the jury. The jury was duty bound to examine each magazine and the special interrogatories assured that it met its duty. Had the jury been instructed in the manner requested by defendant, its function would have been identical: to examine each magazine and determine whether or not it was obscene. Moreover, as already explained, defendant actually benefited in several material ways from this procedure. The procedure here survives constitutional challenge. No constitutional error occurred.

III.

THE ILLINOIS STATUTE IS NOT INVALID FOR FAILING TO PROVIDE A DEFINITION OF "PRURIENT."

Defendant asks this Court to hold the Illinois Obscenity statute unconstitutional for failure to provide any definition of the term "prurient" and thus being in conflict with this Court's decision in *Brockett v. Spokane Arcades, Inc.*,

472 U.S. 491, 105 S.Ct. 2794 (1985). In *Brockett*, this Court held that the definition of "prurient" provided in a Washington obscenity statute swept too broadly. However, this Court need not intervene since neither *Brockett* nor any constitutional authority requires a definition of the term "prurient."

The Illinois statute defines obscenity as follows:

> Any material or performance is obscene if: (1) the average person, applying contemporary adult community standards, would find that, taken as a whole, it appeals to the prurient interest; and (2) the average person, applying contemporary adult community standards, would find that it depicts or describes, in a patently offensive way, ultimate sexual acts or sadomasochistic sexual acts, whether normal or perverted, actual or simulated, or masturbation, excretory functions, or lewd exhibition of the genitals; and (3) taken as a whole, it lacks serious literary, artistic, political or scientific value.

Ill.Rev.Stat. ch. 38, §11-20(b) (1987).

This definition is virtually a word-for-word copy of the definition this Court provided in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607 (1973). In fact, the legislative debates indicate that Illinois' obscenity definition is meant to be totally compatible with the holding of *Miller v. California*. (P.A. 84-709, Section 1, 84th Gen. Ass., 1985; Senate Debates, 84th Gen. Ass., May 8, 1985, pp. 138-139; House Debates, 84th Gen. Ass., June 24, 1985, pp. 160-164).

The term "prurient" is not specifically defined. Rather, it appears in the same way it appears in *Miller*. In footnote 13 of *Brockett*, this Court noted that obscenity statutes which leave the term undefined or which define it only by case law have been upheld. In fact, in most states the term "prurient" is not defined, but this had not ren-

dered the statutes invalid. *Brockett*, 105 S.Ct. at 2802, n.13. *Brockett* contemplates only that, where a state does undertake to define the term "prurient," it may not do so in a way that includes a normal interest in sex.

The Illinois statute is clearly constitutional under *Miller* and *Brockett*.

CONCLUSION

Wherefore, the People of the State of Illinois ask this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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